No. 17-646

In the Supreme Court of the United States

TERANCE MARTEZ GAMBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR EXPANDED ARGUMENT

Pursuant to Supreme Court Rules 28.4 and 28.7, the State of Texas, on behalf of a 36-State coalition of amici (collectively, the amici States), respectfully requests that the Court expand the time allotted for oral argument in order to allow the undersigned ten minutes of argument time. This case implicates the States' core sovereign interests in combating crime and punishing those who offend their laws. As set out in the amici States' brief, those interests are parallel to, yet also distinct from, those of the United States. *See Abbate v. United States*, 359 U.S. 187, 195 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 132 (1959). Amici States are uniquely positioned to represent and defend their interests before this Court.

The United States does not oppose expanding the argument time to allow for ten minutes of argument by the amici States and a corresponding additional ten minutes of argument time for petitioner. Counsel for petitioner indicated that he opposes this motion.

* * *

Amici are 36 States, including the 15 most populous States, and amici collectively represent over 86 percent of the country's population. The amici States' elected leaders span the political spectrum, but the amici States are united in this case by their common interest in maintaining their inherent sovereign authority—which includes the power to prosecute offenses.

The amici States' interests are distinct from, yet complementary to, those of the United States. This Court has long recognized the States' inherent power to define and enforce criminal law. *See Engle v. Isaac*, 456 U.S. 107, 128 (1982). This case implicates that power. Petitioner asks the Court to abolish the centuries-old doctrine of separate sovereigns. That request, if accepted, could alter States' ability to prosecute crime that occurs within their jurisdiction.

The effect of the ruling that petitioner seeks would impact the amici States differently than the United States. Petitioner's arguments, if accepted, would mean that a prior prosecution by *any* sovereign would render a subsequent prosecution by another sovereign invalid under the Double Jeopardy Clause. A central premise of petitioner's argument is that overturning over a hundred years' worth of dual-sovereignty precedent would not be disruptive because state and federal governments can cooperatively decide which entity will prosecute. *E.g.*, Pet. Br. 41-44. But that purported solution is cold comfort to the States. For instance, even if there is some degree of overlap between state and federal criminal jurisdiction, this Court has long recognized that a State's interest in vindicating its sovereign authority through enforcement of its laws generally cannot "be satisfied by another State's enforcement of *its* own laws." *Heath v. Alabama*, 474 U.S. 82, 93 (1985). Moreover,

eliminating dual sovereignty would jeopardize States' ability to prosecute in the face of prosecution by a foreign country. Unlike the federal government, States have no real ability to engage in direct diplomacy with foreign powers with respect to criminal matters.

The Court has regularly allowed States to appear and present oral argument as amici curiae where state-sovereignty issues are presented or where States have a valuable perspective distinct from the petitioner or respondent. *See, e.g.*, *Sturgeon v. Frost*, No. 17-949 (S. Ct. 2018) (granting leave to Alaska); *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) (Kansas); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (Texas); *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (New York); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (New York); *Halbert v. Michigan*, 125 S. Ct. 1822 (2005) (Louisiana); *Clingman v. Beaver*, 125 S. Ct. 825 (2005) (South Dakota); *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 457 (2004) (Alabama); *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 901 (2004) (Ohio); *City of Burbank v. Lockheed Air Terminal, Inc.*, 409 U.S. 1073 (1972) (California). That is true here.

The amici States' participation in argument would be particularly appropriate in this case in light of how the separate-sovereignty doctrine has been shaped by the Court. Two of the principal cases that petitioner seeks to overrule—*Abbate*, 359 U.S. 187, and *Bartkus*, 359 U.S. 121—were heard and decided together as companion cases. Like this case, *Abbate* concerned a federal prosecution following a state prosecution. By contrast, *Bartkus* concerned a state prosecution following a federal prosecution. The two cases thus allowed the Court to hear from both the federal government and the States. By happenstance, the issue in the present case arises in the context of a subsequent federal prosecution. But peti-

tioner's arguments against the separate-sovereignty doctrine do not turn on the unique feature of that arrangement; his arguments apply to *any* subsequent prosecution by *any* separate sovereign. Before the Court takes the momentous step of discarding over a hundred and fifty years of precedent recognizing the sovereignty-specific nature of a Double Jeopardy Clause "offense," the Court should, as in *Abbate* and *Bartkus*, have the benefit of hearing from both the federal government and the States.

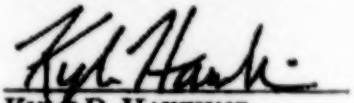
Petitioner would suffer no prejudice from the amici States' participation in oral argument of this case. The amici States consent to a corresponding 10-minute expansion of time for petitioner, should petitioner request that expansion, so that argument time allotted to the two sides would remain equal. That slight expansion is workable, as this is the only case scheduled for argument on December 5, 2018.

The amici States respectfully submit that they can offer the Court a helpful, valuable perspective that is distinct from that of the United States. They further submit that the Court's resolution of this case would benefit from the amici States' participation at oral argument. *See* Sup. Ct. R. 28.4. The amici States therefore respectfully request that they be allotted ten minutes of argument time to advocate for the States' weighty interests in retaining the separate-sovereignty doctrine.

CONCLUSION

The amici States respectfully request that the Court grant the motion to participate in oral argument and for ten minutes of argument time.

Respectfully submitted.



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